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The Swiss Responsible Business Initiative (SRBI) and the Need for Transnational Regulations

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KEYWORDS: Swiss Responsible Business Initiative, Corporate Social Responsibility, Due Diligence, Corporate Liability, Human Rights Violations, Transnational Frameworks of Corporate Social Responsibility, Duty of Care, UN-Treaty on Business and Human Rights, Domestic and Regional Approaches to Corporate Social Responsibility

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Abstract:
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1. Introduction

Non-state actors, such as companies, have grown in importance in recent years. Due to globalisation, they act more often across national borders.[1] Effective legal rules are needed to capture the liability and due diligence problems of companies and their subsidiaries when they act internationally.[2] In addition, international pressure on corporate groups to ensure that their foreign subsidiaries confirm to human rights and environmental standards has increased.[3] At the heart of this issue lies the fact that for a long time companies were not seen as entities that must comply with human rights standards.[4] This context forms the background for the research question central to this essay, namely:

> *How and where can a company be held accountable for the human rights violations and the breach of environmental standards which are committed by its subsidiaries in another country?*

The Swiss Responsible Business Initiative (SRBI) is an illustration of a national approach, using domestic legislation to solve the transnational problem described above. The SRBI proposes a new construction of liability in Swiss national law. This initiative can be understood as part of the wider legal development of corporate liability for violations of human rights and environmental standards abroad, on both the national and international level.[5] In this essay, I will argue that transnational solutions are preferable over national attempts. However, as there is a lack of such solutions, national efforts as the SRBI should be encouraged.

Starting with the SRBI, I examine what has been done in different domestic jurisdictions and on the international level so far and then contrast the different approaches. Finally, I analyse what might be the advantage of having transnational regulations rather than each state trying to solve the above-mentioned problem by itself.

2. The Swiss Responsible Business Initiative (SRBI)

In Switzerland, citizens can demand a partial revision of the Federal Constitution, if 100'000 voters sign the initiative.[6] The committee of the initiative[7] is the organisational group that launches the initiative. The SRBI is such a Swiss initiative and was launched in April 2015 and the required 100’000 signatures were collected in November 2016.[8] The Swiss citizens will vote on it in 2020. This initiative deals with situations in which Swiss companies act abroad, attributing liability to *domestic* actions or omissions of the Swiss company which violate environmental standards or human rights *abroad*.[9] Normally, in such constellations Swiss private international law designates the law of the state in which the violations have occurred as the applicable law («*Erfolgsort*»).[10] This is often

1 Hofstetter (2019), 275.
2 See e.g. Bueno (2017), 1023.
3 Grosz (2017), 978.
4 Kaufmann (2013), 746 f.
5 Enneking (2017), 988, 997.
6 See Art. 138 of the Swiss Constitution (SC).
7 I will refer to the committee of the SRBI as «the committee» throughout this paper.
8 BBI 2015 3245; BBI 2016 8107.
9 Geisser (2017), 947.
10 See e.g. Art. 133 IPRG.

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frustrating for the plaintiffs as these states do not offer effective legal protection or remedies.[11] In such cases, the only legal provision to ensure the applicability of Swiss law is the *ordre public*-reservation. However, this provision is vague and relies heavily on judicial discretion.[12] Instead, the SRBI proposes that fundamental human rights norms and environmental standards shall be applicable, disregarding the applicable law according to the Swiss private international law.[13]

The SRBI goes further still, proposing a detailed mandatory due diligence[14] provision for corporations and a specific liability provision.[15] The initiative states exceptions for SMEs which are not concretised further.[16] The due diligence provision is inspired by the *UN-Guiding Principles on Business and Human Rights* (UNGPs) and the *OECD-Guidelines for Multinational Enterprises* (OME).[17]

According to the initiative, companies that have their registered office («*Hauptverwaltung*») or their principal base of business («*Hauptniederlassung*») in Switzerland, shall be held liable before a Swiss court if one of their controlled enterprises violates human rights or environmental standards abroad.[18] Corporations are liable for the damage caused by themselves and by the companies under their control, unless they can prove that they took all due care to avoid the damage, or that the damage would have occurred even if all due care had been taken.[19] According to the initiative, companies are liable for violations committed by their subsidiaries, but also by companies over which they have «factual control», meaning economic control.[20] Since the initiative does not require a business relationship, but only a *de facto* control or the exercise of economic power, it goes further than the UNGPs and the OME. The operative idea of the SBRI committee is to expand the liability for the whole supply and value chain.[21]

The SRBI states that companies have to follow internationally recognized human rights and environmental standards. Human rights standards include the UNGPs and the OME, the Universal Declaration of Human Rights, the two UN-Human Rights Conventions and the most important Labour Rights of the ILO.[22] The initiative would not impose any further human rights commitments. There is less clarity concerning environmental standards, with no clear definition of which internationally recognized standards would apply. The legislator, meaning the Swiss parliament, would have to specify this provision.[23]

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11 Bueno (2019), 357; Enneking (2017), 989 f.
12 Geisser (2017), 947.
13 id. 947.
14 Throughout this essay, the «duty of care» will be understood as the duty of the company to ensure compliance with human rights and environmental standards, whereas «due diligence» is the process by which the company ensures to comply with these obligations. See Cassel (2016), 179 ff.
15 BBI 2017 6379.
16 BBI 2017 6353.
17 Committee of the SRBI, 10.
18 Reutter/Weber (2019), 18.
19 Bohrer (2017), 323; Bueno (2018).
20 Kaufmann (2016), 50; Kaufmann (2017), 969.
21 BBI 2015 3245 f. See the committee of the initiative, Factsheet V.
22 UNGPs 12; OME IV para. 39.
23 Kaufmann (2016), 50.

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I. Criticism of the SRBI

Critics of the initiative focus on the extension of the companies' liability, because they argue that «factual control» is too vague and far-reaching as a legal term.[24] The Federal Council fears that the Swiss industrial location might face negative economic consequences, as according to the Federal Council no other countries have such strong due diligence and liability provisions.[25] As the initiative only affects companies that have their registered office in Switzerland, companies might just avoid the regulations by moving their registered office to another country.[26] Thus, the Federal Council argues in favour of transnational regulations in this field, instead of a solo attempt of Switzerland.[27]

Furthermore, the Federal Council has raised the concern that the SRBI could constitute a breach of state sovereignty, as the initiative demands that Swiss courts have jurisdictions for cases where violations have been committed abroad. Normally, under Swiss international private law, Swiss courts would not have competence for such cases.[28] Under Swiss international private law, the court of jurisdiction would be either at the registered office of the subsidiary or the contractual party abroad or the courts at the place where the violations were committed.[29] The initiative wants to make the Swiss parent company directly liable and thus wants to fix the court of jurisdiction in Switzerland.[30] Critical scholars argue that evidence collection would be extremely difficult for a Swiss court and that it would be nearly impossible for the parent company to prove that it had taken all due care to avoid the damage.[31] Critics also refer to the frameworks which already exist in this field, e.g. the OME and the according NCPs and hence, they see no use for further regulations.[32]

II. The Parliamentary Counterproposal

Unlike the SRBI, the indirect counterproposal, formulated by the Swiss parliament, takes the form of specific provisions modifying the Swiss Code of Obligations.[33] At the time of writing, the counterproposal is being debated in the two chambers of the Swiss Parliament. The counterproposal is more restricted than the SRBI: it states that the initiative should only apply to half of the corporate groups[34] and liability for damages has been limited so that it merely applies if the parent company was not careful and had no real influence. The company is only liable for serious damage to «life, limb or property» and, while companies may be held liable for legal subsidiaries, any liability for suppliers is strictly excluded.[35] The committee has declared that it will withdraw the initiative if the

[24] See e.g. Handschin (2017), 1001 ff.; Hofstetter (2019), 277.
[25] BBI 2017 6365.
[26] BBI 2017 6365.
[27] BBI 2017 6365.
[28] BBI 2017 6366 f.; Bohrer (2017), 330. See Art. 5 para. 5 LugÜ and Art. 129 IPRG.
[29] Bohrer (2017), 330.
[30] id. 330.
[31] id. 330.
[32] Bazzi (2019), 197; Bohrer (2017), 331.
[33] Bueno (2018), 2.
[34] Should only apply to companies having more than 500 employees/80 million sales/40 million balance sheet total.
[35] Committee of the Initiative, Zusicherung des Rückzugs, 1; Bueno (2019), 361 ff.

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counterproposal is adopted in its current version. This would mean that the Swiss population would vote only on the counterproposal.[36]

3. Transnational Approaches

I. Transnational Environment of the SRBI

Internationally, there are increasingly more binding due diligence obligations, mostly relating to specific aspects of entrepreneurial activity. This trend cannot be explained solely by the adoption of the UNGPs, but is connected with the interaction of new national regulations and international developments and in case law. Generally, a transformation from soft law to hard law occurs.[37]

In order to contextualize the SRBI, I will examine the most important international and domestic approaches in the field of Corporate Social Responsibility (CSR). One can distinguish between general duties of care for management and supervisory bodies and specific duties of care applicable to certain sectors or industries.

a. International Approaches to CSR

Adopted in 2011, the UNGPs are the most important international soft law framework in the field of CSR. The UNGPs are essential as they extend the duty to comply with human rights to companies.[38] The Principles build on the three leading principles of the *Protect, Respect and Remedy Framework* (PRR), formulated by the Human Rights Council in 2008, namely: state duty to protect, corporate responsibility to respect and access to remedy.[39]

Even though the UNGPs are not legally binding, they have triggered many regulatory processes on the national and international level.[40] The most important international concretisation are the OME. These guidelines are legally binding for OECD-member states but not for companies.[41] Nevertheless, the states, as they are bound by the OME, want the companies to adhere to them. The dispute settlement mechanism is essential: OECD-member states are obliged to set up National Contact Points (NCPs), where complaints can be made that the guidelines were not fulfilled. The NCPs offer the parties mediation. The NCPs are the only international, state-based, extrajudicial dispute settlement mechanism in the area of CSR.[42] Though not binding on companies, non-compliance with the guidelines has increasingly severe consequences: e.g. government financing of exports can be made conditional on the fulfilment of the OME.[43] Also, in comparison to the UNGPs, the OME concretize the due diligence guidelines and make them usable in daily business work, setting the only internationally accepted standards for due diligence.[44]

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36 Committee of the Initiative, Zusicherung des Rückzugs, 2.
37 Kaufmann (2017), 970.
38 Kaufmann (2013), 749.
39 id. 748.
40 Kaufmann (2018), 331.
41 id. 331 f.
42 id. 332.
43 See e.g. Kanada: Canada's Corporate Social Responsibility Strategy, 2014, 12, <www.ncppcn.gc.ca> (accessed 14 November 2019).
44 Kaufmann (2018), 333.

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b. Domestic and Regional Approaches to CSR

1) General Domestic and Regional Due Diligence and Liability Provisions

The United Kingdom enacted the *Companies Act* (CA UK) in 2006 which incorporates human rights and environmental aspects in the companies' general duty of care.[45] Members of management bodies are obliged to take into account the effects on the community and the environment as well as the objective of a high standard of responsible corporate management in their activities.[46]

The *loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (Loi de vigilance),* enacted in 2017 in France, is the most prominent example for binding and relatively detailed rules for the duty of care for non-financial risks. The law is pursuant to the UNGPs and the OME and obliges companies to conduct a due diligence process (*plan de vigilance*) – not just for their own actions but also the actions of their directly or indirectly controlled enterprises within the context of business relations.[47] The law requires them to implement the appropriate measures to avoid damages and risks which are defined in the law (*obligation de moyens*). Violations of these provisions may result in civil penalties provided that the damage incurred could have been avoided or mitigated with sufficient care.[48]

The *EU-Directive 2014/95* lays down the rules for disclosure of non-financial and diversity information by certain large companies. Companies having more than 500 employees must submit a non-financial statement, relating to at least environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters. Companies must either explain their concepts and due diligence provisions or make clear why no such concepts are presented. The requirements stated by the EU-Directive are strongly related to the OME. Member states have a wide margin of discretion regarding implementation of the directive especially concerning the possibility of reviewing the content of the statements made.[49]

2) Subject-Specific Liability Provisions

Like the EU-Directive, the *UK Modern Slavery Act* of 2015 (MSA) obliges companies to publish a statement. However, unlike the directive, the statement focuses only on human trafficking and modern slavery.[50] Companies must give a summary of the measures taken to avoid human trafficking and modern slavery throughout their whole supply and value chain.[51] The MSA does not contain any binding due diligence obligations, but uses transparency regulations to ensure that companies integrate slavery and human trafficking as issues into their due diligence.[52] Even though the MSA follows the

[45] Kaufmann (2018), 333.
[46] CA UK, Sec. 172(1) and 172(1)(d).
[47] Kaufmann (2018), 334.
[48] Kaufmann (2017), 973; Kaufmann (2018), 334.
[49] Kaufmann (2018), 334.
[50] id. 335.
[51] See Art. 54 para. 6 MSA.
[52] Kaufmann (2017), 972.

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approach of *comply* or *explain,* companies still can be liable according to the implementing laws of the *EU-directive 2014/95*[53] and the general duties of care stated in the *CA UK 2006*.[54]

After the Global Financial Crisis (2007-8), the *American Dodd-Frank Act* (DFA) was enacted in the United States. This is one of the first laws to focus on especially delicate areas such as conflict minerals. The idea is to prevent threats to human rights such as financing of the conflict in the Democratic Republic of the Congo through proceeds of minerals' sales, by stating detailed rules on due diligence and reporting.[55]

In 2017, the *EU-Regulation 2017/821* was enacted. This regulation goes further than the DFA in that the due diligence requirements are embedded in the broader context of responsible corporate governance by referring both to the UNGPs and to the specific standards of the OME. The regulation is directly applicable without implementation into national law and the due diligence obligations laid down in it apply to all natural and legal persons who import tin, tantalum, tungsten, their ores and gold from conflict-prone and high-risk areas into the EU.[56]

II. Evaluation of the Transnational Environment of the SRBI

Neither the UNGPs nor the OME contain specifications as to how states implement the human rights and environmental due diligence obligations of companies. Both instruments assume that a balanced mixture of mandatory and non-binding standards («*smart mix*») achieves the highest degree of efficiency.[57] Many countries share the conviction that strengthening corporate due diligence is a central element for the effective implementation of the UNGPs. However, France is the only country so far that not only regulates specific aspects of due diligence but states comprehensive general human rights and environmental duties of care.[58]

As shown, various countries (including the UK, USA, France and EU member states) have already introduced mandatory due diligence requirements. Three main models of government regulation for human rights and environment-related due diligence obligations can be distinguished:

(1) general duties of due diligence, which are based on responsibility towards society,
(2) industry or topic-specific duties of due diligence, and
(3) comprehensive human rights and environmental duties of due diligence.

States utilising the first model have a general duty of care with regard to corporate responsibility towards society. This includes the UK. This broad concept of CSR, meaning obligations towards society, includes respect for human rights and the environment, even without explicit mention.

A group of countries has introduced industry or topic-specific mandatory due diligence requirements listed in the second model. Some of these requirements apply in addition to the general due diligence

[53] The Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016 (no. 1245 of 2016), <www.legislation.gov.uk/uksi/2016/1245/contents/made> (accessed 17 November 2019).
[54] CA UK sec. 172.
[55] Kaufmann (2018), 335.
[56] id. 335.
[57] Kaufmann (2017), 975.
[58] id. 973.

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requirements of the first category. Such due diligence obligations include e.g. the MSA; Sec. 1502 of the American DFA and the new *EU-Regulation on conflict minerals*.

The third model is exemplified by the *Loi de vigilance* in France, which introduces comprehensive, binding human rights and environmental due diligence obligations based on the UNGPs and the OME.[59]

4. Contextualizing the SRBI

I. Embedding the SRBI in the Transnational Environment

By imposing legally binding duties of care for companies relating to human rights and the environment, which relate to the entire supply chain, the SRBI addresses concerns of the UNGPs (human rights) and the OME (Environment). These duties of care are concretised in the initiative with explicit reference to human rights and international environmental standards. The initiative combines approaches such as those found in the rather unspecified regulations of the first model with specific human rights and environment-related provisions of the second model described above. This results in a model that is close in content to the human rights and environmental due diligence obligations of the *Loi de vigilance.*[60] Thus, the content of the SRBI follows international developments. However, this is not true for the scope of these due diligence obligations.

All of the mandatory due diligence regulations examined in this paper under «Domestic and Regional Approaches to CSR» apply to a company's own actions or omissions. The activities of third parties are only subject to the regulations if these third parties are directly linked to the company through business relationships. The due diligence obligations also include activities within corporate structures in the countries examined.[61] None of the examined countries seem to have due diligence requirements for entities outside a business relationship or group structure.

The SRBI partly follows the international guidelines and the developments in other countries described above. In one respect, however, it exceeds these requirements and developments: the SRBI extends the duty of care to constellations of the exercise of economic power through factual controls, irrespective of any business relationship.[62] With this provision, the committee of the initiative aims to close a liability gap that they have identified, since liability processes often fail due to lack of possibility to intervene and sue the parent company.[63] Although it is true that various courts have refused to hear cases against independent subsidiaries, in most cases this was not justified by the parent company's inability to intervene, but due to the parent company's lack of material duty of care for subsidiaries' actions.[64]

With the extension of the duty of care to constellations of factual control and the exercise of economic power outside of a business relationship, the initiative is breaking new ground and goes beyond the UNGPs and the OME. The explanatory text on the initiative does not make it clear whether the

[59] id. 975.
[60] Kaufmann (2017), 975 f.
[61] id. 976.
[62] id. 976.
[63] Committee of the SRBI, 1.
[64] Kaufmann (2017), 976.

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initiators are deliberately seeking a pioneering role for Switzerland, nor does it rule out (editorial) oversight by the committee.[65]

II. Switzerland as a Pioneer

The SRBI can be contextualized in the international trend of the transformation of soft law into hard law in the area of CSR. In various countries, discussions are taking place as to whether the activities of independent subsidiaries should also be covered by the due diligence obligation of their parent company, as suggested in the SRBI. However, there are no explicit statutory provisions that stipulate that such activities are subject to due diligence in the sense of legally standardized enforcement or «piercing of the corporate veil», regardless of the legal nature of the subsidiary.[66] So, with the extended scope of the due diligence obligations, according to which the activities of *de facto* controlled companies should also be covered outside business relationships, Switzerland would enter new territory on its own.[67] It can be concluded that the content of the due diligence obligations in the SRBI are based on the international instruments recognised by Switzerland. If the Swiss population votes for the counterproposal rather than the SRBI, those due diligence provisions would not go further than in the already established transnational frameworks.

5. Business and Human Rights – A Possible Solution?

I. SRBI or Transnational Attempts?

Even though the SRBI would go further in the extension of due diligence obligations, taking a step back, it is questionable whether the SRBI is the right way to go: The SRBI tries to solve a transnational problem by domestic legislation, which implies the inherent problem: Can a transnational issue ever be solved effectively by domestic legislation? Furthermore, having the means of a popular initiative is a peculiarity of the Swiss legal system, which means that other countries could not follow the Swiss example so easily. Thus, resorting to domestic legislation is not effective enough.

Even if the SRBI were accepted, this would only provide a partial solution to the problem, as the initiative only applies to companies with their office registered in Switzerland. Hence, transnational solutions are preferable; however, they are often more complicated and slower to develop. In negotiating general consent between all parties there is a danger that the resulting due diligence obligations might be vaguer and less ambitious.

In an ideal world, an effective and binding international legal framework dealing with the actions of subsidiaries acting abroad that commit human rights or environmental violations would be desirable. However, as long as no such framework exists, national attempts such as the SRBI are better than nothing and should be encouraged. It is incumbent on one country, in this case Switzerland, to play the pioneering role which can inspire other countries to adopt similar laws. This is especially true as many countries already have national laws in this field which just do not reach as far as would the SRBI. A realistic approach is the maintenance of a parallel system: meaning increased attempts on both the

[65] id. 976.
[66] Kaufmann (2017), 971.
[67] Opposite opinion: see Enneking (2017), 992.

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national and international levels. The international level is more effective, but slower and potentially less ambitious, whereas the national attempts reach further and are faster, but are potentially less effective.

II. UN-Treaty «Business and Human Rights»

Lawyers and activists have debated ways of incorporating an international obligation for companies in the field of human rights since the 1970s.[68] However, it was not until 2014 that the Human Rights Council created an Open-ended Intergovernmental Working Group (OEIWG) to develop an international, legally-binding instrument to regulate the activities of transnational corporations and other business enterprises in international human rights law.[69] The UN is currently negotiating a possible treaty on «Business and Human Rights».[70] The zero draft was presented in 2018[71] and a revised draft was released in July 2019 (UN Draft BHR). In its current draft, the treaty attempts to provide better-established rights for affected individuals and communities that are at high risk in the context of corporate activities, including human rights defenders and protected persons and populations, among other groups. In Art. 5 the draft requires the adoption and implementation of enhanced human rights due diligence to prevent human rights violations or abuses in occupied or conflict-affected areas, arising from business activities or contractual relationships, including with respect to products and services.[72] However, the obligated parties of this draft treaty are the states and not the companies directly; UN member states must provide the legal framework for the companies' due diligence and their liability.[73]

6. Conclusion

As the vital role of companies acting abroad cannot be ignored any longer, it is more essential than ever to capture their actions legally and provide effective due diligence and liability provisions for their actions abroad. The SRBI demonstrates an effective attempt. Furthermore, this initiative is a good example to show how transnational problems may be solved by domestic legislation. However, as seen, transnational attempts would be more efficient – but while the UN Business and Human Rights Treaty remains to be adopted, national attempts such as the SRBI should be encouraged.

68 Rivera (2017), 1200.
69 Ford/Methven O'Brien (2017), 1224.
70 Geisser/Kaufmann/Schmid (2017), 928.
71 Pigrau Solé/Iglesias Márque (2019), 1.
72 Abdallah (2019).
73 Kaufmann (2013), 746.

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